IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

CRIMINAL APPEAL NO.1115 OF 2004

Dr.Abdul Mateen Abdul Basit ..Appellant

V/s.

The State of Maharashtra ..Respondent

Mr.Vijay Pradhan, Senior Counsel with Mr.M.H.Solkar for the appellant.

Mrs.U.V.Kejriwal, Additional Public Prosecutor for the Respondent/State.

W I T H

CRIMINAL APPEAL NO.1538 OF 2004

The State of Maharashtra ..Appellant

V/s.

Dr.Mohammed Abdul Matin Abdul Basit. ..Respondent

Mr.V.A.Thorat Advocate General alongwith Mrs.U.V.Kejriwal Additional Public Prosecutor for the Appellant/State.

Coram : R.M.LODHA & R.S.MOHITE,JJ

Date : 08.02.2005.

PC

. Both these appeals relate to the original accused no.1 being tried under Prevention of Terrorist Act 2002 (POTA-2002) in Special Case No.1 of 2002 by the

Special Judge of POTA-2002, Mumbai and therefore, these appeals were heard together and are being disposed of by this common order.

2. At Ghatkopar police station, C.R.No.356 of 2002 was registered on 2.12.2002 in relation to explosion in BEST bus at 18.30 hrs. resulting in death of two persons. A case was initially registered under Section 120-B, 302, 307, 326 read with section 34 of IPC and under Indian Explosive Act and Explosive Substance Act. During the course of investigation provisions of POTA-2002 were applied. The charge-sheet was filed in the Court on 9.4.2003. Thereafter further investigation was carried out and after conclusion of further investigation, further material collected during the course of the investigation was filed before the Court. In all, 19 persons came to be arrested. 10 accused persons are still absconding.

3. Presently, 8 accused persons are facing trial in a Special POTA Case No.1/2002. The appellant in Criminal Appeal No.1115/2004 and the respondent in Criminal Appeal No.1538 of 2004 is the accused no.1 in the said trial.

4. For the sake of convenience in this order we shall hereinafter referred to the appellant in Criminal Appeal No.1115/2004 and the respondent in

Criminal Appeal No.1538/2004 as the accused no.1.

5. The Special court framed the charges on 5.7.2004

The accusations against the accused no.1 are thus :-

FIRSTLY : That you accused nos.1 to 8 during the period between March 2002 to 2nd December 2002 by meetings as well as by telephonic communications had entered into criminal conspiracy with intention to threaten security of India or to strike terro in people by use of bomb or explosives of chemicals or such other substances with a view to cause death or injury to persons and to cause loss or damage to public property so as to disrupt the essential services to the life of community, you had with a view to promote objects of terrorist organizations such as Lashkar-E-Toeba, Al-Qaida, Jaish-E-Mohammed and Students Islamic Movement of India had aided and abetted each other as also the wanted accused at preparatory stages for to commit terrorist acts or knowing it to be likely that terrorist acts would be committed which would result into loss of life or injury to section of people or which will cause significant damage to any property; with intention to strike terror in the people to further the activity of the terrorist organizations in and around Mumbai city and in furtherance of the said Criminal conspiracy between you as well as wanted accused and also the accused who are subsequently and reportedly dead; bomb explosion was caused on 2.12.2002 at about 18.30 hours in the BEST Bus bearing No.MH-01-H-8532 plying on route no.416 from Amrutnagar to Ghatkopar at Ghatkopar West, Mumbai which resulted into death of two persons viz. Jagdish @ Jagbeer Dilelsingh Duhan and Kumar Rajeev Ranjan Singh and caused injuries to 49 persons as well damage or destruction of the said public property BEST Bus bearing No.MH-01-H-8532 with a view to disrupt the essential services to the life of the community and thereby you have committed offences punishable under Section 120-B of the IPC read with section 3(1) (a), 3(20 and 3(3) of the POTA 2002.

SECONDLY : You the above named accused had entered into criminal conspiracy secretly hatched as a result of telephonic communications and meetings held by you with a view to develop links with banned terrorist organizations such as Lashkar-e-Toeba, Al-Qaida, Jaish-e-Mohammed and Students Islamic Movements of India for to protect the fundamentalists view and policies with intention to

avenge the killings of muslims in Gujarat communal riots by announcing Jehad (holy war) against Hindus and India by indulging into terrorist activities in the city of Mumbai and suburban areas and thereby you have committed an offence punishable under section 120-B of the IPC read with section 153-A of the IPC further read with section 3(3) of the POTA 2002.

THIRDLY : You accused no.1 above named while occupying room no.72 in the J.J.Hospital compound, Mumbai since October 2001 had allowed the co-accused Shaikh Mohammed Mujamil Jamil Ahmed (accused no.2), wanted accused Imran of Hyderabad (reportedly dead) as also Imran Rehman Khan @ Zuber @ Sunny (accused no.3) to stay in the aforesaid room and you were moving in their company planning and conspiring to avenge killings of Muslims in Gujarat communal riots and atrocities committed and also participated in the activities of banned terrorist organization Students Islamic Movements of India and thereby you no.1 have committed offence punishable under section 3(3) of POTA 2002 and also under section 3(4) by giving shelter or harboring the terrorists in the said room.

6. The accused no.1 applied for grant of bail vide Bail application No.1 of 2003 inter alia on the ground that he was already in custody for more than a year; that the stringent provisons of section 49 of Prevention of Terrorist Act (In short ‘POTA 2002’) for the grant of bail now do not apply and that he has been falsely implicated. Few other accused persons also applied for grant of bail being Bail application no.3/2003, Bail application no.4/2003 and Bail application no.5/2003. The learned Judge presiding over the Special Court constituted under the POTA 2002 heard all the bail applications together. After hearing the learned Counsel for the accused persons as well as the learned Public Prosecutor, the Special Judge vide

order dated 19.4.2004 rejected all the bail applications. Being aggrieved by the said order, accused no.1 has preferred Criminal Appeal no.1115/2004.

7. Accused No.1 made another Bail application being Bail application No.16 of 2004 before the Special Court for grant of bail. Amongst others the contentions raised on behalf of accused no.1 in support of Bail application No.16 of 2004 were that in view of the Judgment of the Full bench of this Court in Criminal Writ Petition No.1742 of 2004 decided on 5.11.2004 the confessional statements of the co-accused are not substantive piece of evidence ; that the prosecution has examined about 72 witnesses but none of these witnesses have implicated the accused no.1 and that the prospect of early completion of trial was grim. Bail application No.16 of 2004 was opposed by the Public Prosecutor. The learned Special Judge, by his order dated 14.12.2004, subject to the final hearing of the bail application on merits, ordered release of the accused no.1 on interim bail on the conditions stated in the order. Aggrieved thereby the State has preferred Criminal Appeal No.1538 of 2004.

8. Both the appeals were heard by us at quite some length.

9. That after the order was passed by the Special Court on 19.4.2004 rejecting the Bail application of the accused no.1 and 3 other accused persons, the trial in the special case had commenced is not in dispute. As on date, the prosecution has examined 91 witnesses. The learned Advocate General contended that the order in which the prosecution witnesses are to be examined is a matter that concerns the Public Prosecutor and the defence cannot dictate the order in which the prosecution witnesses should be examined. He referred to the affidavit of S.S.Walishetty, Assistant Commissioner of Police, dated 4.2.2005. In paragraph 16 of the affidavit of S.S.Walishetty it is stated that the prosecution do not propose to examine more witnesses from Aurangabad ; thereafter the witnesses concerning the confessional statements of the accused persons shall be examined. It is further stated that once this evidence is led, the other witnesses concerning the accused no.1 will be examined that includes 8 more witnesses whose statements came to be recorded under Section 161 of the Cr.P.C. 1973. The learned Advocate General submitted that thereafter the prosecution shall examine further witnesses to prove the documents taken charge from the authorities of J.J. hospital to establish history of the accused at room no.72 at J.J.hospital and further more documents taken charge

from banks and government medical college.

10. In so far as Criminal Appeal No.1115/2004 is concerned, as already noticed above, the Bail application of the accused no.1 came to be rejected before the charges were framed by the Special Judge. The trial commenced and has progressed thereafter. As noticed above, by now 91 witnesses have been examined. Though the said witnesses seem to be more of formal nature. As a matter of fact, Mr.Vijay Pradhan, the learned Senior Counsel during the course of hearing showed the inclination that the accused no.1 may be given liberty to apply for bail after the relevant witnesses whose respective police statements appear to show a nexus between the accused no.1 and the charges framed against him are examined as prosecution witnesses.

11. The submission of the learned Senior Counsel is fairly reasonable and in view thereof it is not necessary to go into the merits of the order passed by the learned Special Judge on 19.4.2004 rejecting the bail application of the accused no.1.

12. When we advert to the order dated 14.12.2004 whereby the Special Judge granted interim bail to the accused no.1 pending final hearing of the bail application no.16/2004, we find that the order cannot be sustained. Merely because 72 witnesses

who were examined by the prosecution by then did not provide for incriminating evidence against the accused no.1, the grant of interim bail cannot be said to be made out when number of witnesses whose statements under Section 161 of Cr.P.C. were recorded are yet to be examined. Significantly there is no finding by the learned Special Judge that there is no material whatsoever against the accused no.1 connecting him with the crime. We find the approach of the learned Special Judge little bit strange in granting the interim bail to the accused subject to final hearing of the bail application.

13. Having considered all the aspects, we are of the view that grant of interim bail by the learned Special Judge pending the final hearing of bail application was neither proper nor justified. It was and is open to the learned Special Judge to dispose of bail application finally after hearing the learned Counsel for the accused and the learned Public Prosecutor on the basis of the available evidence and the material and pass an appropriate order granting or refusing the bail. However, since the learned Counsel for the accused no.1 expressed the view that the bail application may be considered after the prosecution examines the witnesses through whom confessional statements allegedly made by the co-accused are to be proved and the witnesses whose statements have been recorded under Section 161 of

Cr.P.C., we are of the view that the interest of justice would be sub-served if bail application no.16/2004 is heard after the relevant witnesses showing nexus between accused no.1 and the charges framed by the State, are examined by the prosecution.

14. It is true that defence cannot and should not suggest the order in which prosecution must examine its witnesses but it needs no emphasisis that it is the Court that controls the trial and prosecution can always be asked by the court to examine certain witnesses first before other witnesses are examined.

15. In the light of what we have observed above, we are satisfied that it is not necessary to go into diverse aspects of the matter raised in the appeals and follwing order shall meet the ends of justice.

O R D E R

(i) Criminal Appeal No.1115/2004 is dismissed.

(ii) Criminal Appeal No.1538/2004 is allowed. The order dated 14.12.2004 passed by the Special Judge under POTA-2002 granting interim bail to the accused no.1 is set aside.

(iii) The prosecution shall now examine those prosecution witnesses through whom confessional statements allegedly made by the co-accused are to be proved and the prosecution witnesses whose respective police statements recorded under Section 161 of Cr.P.C. show a nexus between the accused no.1 and the charges framed against him.

(iv) Bail application No.16 of 2004 shall be heard and disposed of by the learned Judge presiding Special Court after the aforesaid evidence is recorded uninfluenced by its earlier order passed on 19.4.2004 in Bail Application No.1 of 2003 and the order dated 14.12.2004 passed in Bail application No.16/2004. We clarify that the accused shall be at liberty to amend the said bail application or make fresh application for bail.

(v) All contentions of the parties are kept open to be agitated before the Special court at the time of hearing of Bail application No.16 of 2004 or the fresh bail application as the case may be.

. Both the appeals stand disposed of accordingly.

(R.M.LODHA,J)

(R.S.MOHITE,J)